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SUPREME COURT, U.S.

IN THE SUPREME COURT OF THE UNITED STATES

No. A-720

78-6423

UNITED STATES OF AMERICA

Appellee

v.

DONALD E. ROBERTSON

Appellant

PETITION FOR WRIT OF CERTIORARI

To The Supreme Court of the United States

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Appendix A

IN THE SUPREME COURT OF THE UNITED STATES

No. A-720

UNITED STATES OF AMERICA,

Appellee

v.

DONALD E. ROBERTSON,

Appellant

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE UNITED STATES

To the Honorable, the Chief Justice and Associate Justices of the Supreme Court of the United States.

Donald E. Robertson, the Appellant herein, prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Eighth Circuit entered in the above-entitled case on November 20, 1978.

OPINIONS BELOW

This case was originally heard by a jury in the United States District Court for the Eastern District of Missouri, Eastern Division, and a decision was rendered in favor of the United States and against Appellant on May 25, 1978. This opinion was affirmed by the United States Court of Appeals for the Eighth Circuit on November 20, 1978. A copy of the Court of Appeals opinion is attached hereto as Appendix A.

JURISDICTION

The judgment of the United States Court of Appeals for the Eighth Circuit was entered on November 20, 1978. A timely petition for rehearing was denied on January 23, 1979. The jurisdiction of the Supreme Court is invoked under 28 USC §1254(1). On February 10, 1979, the Supreme Court by order granted the Appellant an extension of time until March 24, 1979, for filing his Petition for Writ of Certiorari.

QUESTION PRESENTED

Did the Courts below err in admitting into evidence the Government's Exhibit Number 1 which was the only evidence submitted showing the value of the goods stolen for the reasons that:

a) There was improper foundation laid for admission of the evidence under the business records exception to the hearsay rule;

b) By admitting Government's Exhibit Number 1 into evidence, the District Court denied Robertson his Sixth Amendment right of confrontation?

LAW INVOLVED

The Rule involved herein is Federal Rules of Evidence Rule 803(6), which states as follows:

"The following are not excluded by the hearsay rule, even though the declarant is available as a witness:

...(6) Records of regularly conducted activity. -- A memorandum, report, record, or data compilation, in any form, of acts, events, conditions, opinions, or diagnoses, made at or near the time by, or from information *trans-*

mitted by, a person with knowledge, if kept in the course of a regularly conducted business activity, and if it was the regular practice of that business activity to make the memorandum, report, record, or data compilation, all as shown by the testimony of the custodian or other qualified witness, unless the source of information or the method or circumstances of preparation indicate lack of trustworthiness. The term "business" as used in this paragraph includes business, institution, association, profession, occupation, and calling of every kind, whether or not conducted for profit."

Also involved is the Sixth Amendment to the United States Constitution which provides that "in all criminal prosecutions, the accused shall enjoy the right... to be confronted with the witnesses against him."

STATEMENT OF THE CASE

Appellant, Donald E. Robertson, hereby appeals his conviction under a two-count indictment charging him with violating Title 18 United States Code, Section 23.14. Appellant and a co-defendant, Ronnie Little, were charged under Count I with transporting in interstate commerce, stolen goods with a value of more than $5,000 and under Count II with conspiring to transport said goods.

The U.S. District Court for the Eastern District of Missouri ruled that Government's Exhibit Number 1 was admissible as evidence under Federal Rules of Evidence Rule 803(6), the business record exception to the hearsay rule. Exhibit Number 1 was an invoice prepared by the John Deere Company containing a list of items which had been shipped over a period of time to the burglarized company, William Nobbe and Company, by the John Deere Company. Beside several items on

the list was a notation of "stolen", apparently written in by an insurance adjuster to indicate merchandise which had been received by William Nobbe and Company but which could not be accounted for following the burglary. Robert Nobbe, part owner of William Nobbe and Company, was the only witness called by the Government to testify regarding the list. Nobbe testified that he had no personal knowledge of the items taken, that he did not prepare or assist in preparing the list referred to as Exhibit Number 1, and that he did not know if the list was correct. Exhibit Number 1 constituted the only evidence that the value of the stolen goods exceeded $5,000.

The District Court entered a jury verdict of guilty against Appellant, Donald E. Robertson, on May 25, 1978. This conviction was affirmed by the United States Court of Appeals for the Eighth Circuit in an opinion issued on November 20, 1978. Appellant's timely-filed petition for rehearing was denied on January 23, 1979.

The United States Court of Appeals for the Eighth Circuit stated in its opinion that

> "[i]t was error to admit Exhibit 1 into evidence in its entirety because the notation 'stolen' was not entered on Exhibit 1 in the ordinary course of William Nobbe & Company's business. [Citations] However, the Exhibit was admissible in all other respects as a record kept in the regular course of business. It was admissible to show the items which John Deere Company had shipped to William Nobbe & Company. It also provided evidence of which items were on hand as of June 25, 1975, and their value."

The Court concluded that the admission of Exhibit Number 1 as evidence had not been prejudicial to the defendants.

REASONS FOR GRANTING THIS WRIT

a) There was improper foundation laid for the admission of the government's Exhibit No. 1 under the Business Records Exception to the Hearsay Rule because the purported custodian of the record did not have direct knowledge of the business practices of the record-keeping company.

During the trial, the government introduced as Exhibit No. 1 a list of items which, according to the witness, Robert Nobbe, were not made by him or his employees and which might not be correct. This list was the only "evidence" of the items stolen and their value. The Court allowed the introduction of that document over the objections of defendants.

Federal Rules of Evidence, Rule 803(6) (former Rule 28 USCA 1732) allows documents, if made in the course of business, to be submitted into evidence under certain circumstances. However, not every writing is admissible simply because it is made or rendered in the conduct of some business, Standard Oil Company of California v. Moore, 251 F.2d 188 (C.A. 9 1957). Compliance with all of the qualifications of the Rule is necessary. Palmer v. Hoffman, 318 U.S. 800 (1943).

It is not the design of this Rule to make all business and professional records admissible as competent or relevant regardless of the purpose for which, or the manner in which, such records are made, and the mere fact that a document or record is generally admissible under the statute does not

mean that any and everything contained in the writing is necessarily admissible in any given case. 32 C.J.S. Evidence §682(2).

The test of admissibility under the Rule is the character of the records and their earmark of reliability acquired from their source and origin and the nature of their compilation. Palmer v. Hoffman, supra.

In order to lay a foundation for the admission of entries of clerks and third persons in the regular course of business, the facts required by law as prerequisites to admissibility must be established. 32 C.J.S. Evidence §693. One of these prerequisites is that the documents must be shown to have been made in the regular course of business of the company in whose files they are found. Phillips v. United States, 356 F.2d, 307 (C.A. 9 1965). Taylor v. Heller & Co., 364 F.2d (C.A. 6 1966). Gray v. L. J. Navy Trucking Co., Inc., 475 F.2d 545, 548, 549 (C.A. 6 1973).

In order to show that the documents were made in the regular course of business, it is vital to have someone with direct knowledge of the business testify that the records were made as part of that practice. J. Howard Smith v. Maranon, 501 F.2d 1275, 1278 (C.A. 1 1974). United States v. Rosenstein, 474 F.2d 705, 710 (C.A. 2 1973). United States v. Berkowitz, 429 F.2d 921, 927 (C.A. 1 1970). Ace Freight Forwarding, Inc. v. Baltimore & Ohio R.R. Co., 202 A.2d 649, 651 (D.C. 1964).

The Court in J. Howard Smith v. Maranon, supra, stated at page 1278:

> Appellants sought to establish the foundation through the testimony of an employee of one of the Appellants who was not associated with the Peruvian firm (the firm which made the record). He had no personal knowledge of how the firm created or kept the records. Thus, there was no testimony by someone who was sufficiently familiar with the business practice of the record-keeping company, and no adequate foundation was established.

The Court concluded that while the foundation need not be established by one who personally makes or keeps the records, it was insufficient to rely on one who had no direct knowledge of the business practice of the company which kept the records. This holding was also reached in R. P. Farnsworth & Co., Inc. v. Continental Marble Co., 276 F.Supp. 349 (D.C. Puerto Rico 1967). The same result was reached in Ace Freight Forwarding, Inc. v. Baltimore & Ohio R.R. Co., supra, where a company president attempted to establish the losses claimed by inventories received from an independent company. In that case, the Court held that the inventories were not admissible because they were not compiled by some officer or employee of the company in the course of his regular employment; nor were they prepared by an entrant who had personal knowledge of the value of and damage to the goods.

The case of United States v. Rosenstein, supra, involved a tax evasion scheme in which the defendants forwarded mail through their attorneys. One of the defendant's attorneys produced a file containing documents written by the defendants and third parties. The witness sought to lay a proper foundation for the admission of these documents under the Business Records Exception. However, the Court at page 710 rejected the admission

of the exhibit on the grounds that "Someone who is sufficiently familiar with the business practice must testify that the records were made as a part of that practice. Dr. Monaunis' (the witness) testimony did not rise to this level of requisite knowledge." Furthermore, in United States v. Berkowitz, supra, a carrier obtained an invoice from a shipper for the purpose of determining its liability for the loss of goods. The Court found that the invoice was not a record made by the carrier in the regular course of its business, rather, it was merely a copy of an invoice made by someone else and then sent to the carrier. The Court held that the fact that the carrier relied on the invoice to establish the amount of the loss did not supply the critical omission of any evidence that the shipper made and produced the invoice in the regular course of its business. The Court concluded that the witness (the carrier's representative) "could testify to the receipt and retention of the invoice, but not to its trustworthiness as to the business record made by Phoenix Slipper Co. (the carrier)."

The above requirements have also been upheld in the Eighth Circuit where this Court held that the witness laying the foundation for introduction of a business record must have direct knowledge of the business practice of the company which kept the records. Rice v. United States, 411 F.2d 485 (C.A. 8 1969). On page 488, this Court held that the witness had supplied a proper foundation only after testifying that he was thoroughly familiar with the procedure of the company which had prepared the document.

In the present case, the government submitted Exhibit No. 1 into evidence in order to show that the value of the goods allegedly stolen exceeded $5,000.00. The maker of the record did not testify nor did anyone testify that the record was prepared under their jurisdiction and control. Instead, the government relied on the testimony of Robert Nobbe, part owner of Robert J. Nobbe & Co., who supplied a document which had been prepared by an outside party and which Mr. Nobbe admitted he did not know was correct. He testified that neither he nor anyone employed by his company wrote the references to items stolen that appeared in Exhibit No. 1. He speculated that it might have been the insurance company although he did not (because he could not) testify that it was the normal course of the insurance company's business to take such an inventory. Thus, Nobbe did not know for sure who had written the record or whether it was correct.

Exhibit No. 1 was not a record "made" by Nobbe in the regular course of his business. It was a copy of notations written on an invoice by someone else, and apparently delivered to Nobbe's company. The fact that he and his company relied on the notations and the invoice to establish the amount of loss does not satisfy the critical element that in order for it to be admissible, it would have had to have been made in the regular course of its business. United States v. Berkowitz, supra, at 927. Nobbe could only testify to the receipt of

the invoice from an outside source, but not to its trustworthiness as a business record. United States v. Berkowitz, supra, at 927. Smith v. Maranon, supra; United States v. Rosenstein, supra; Standard Oil Company v. Moore, supra.

It is important for this Court to note that Exhibit No. 1 is the only evidence which could show that the value of the stolen goods exceeded $5,000.00. Nobbe personally was unaware of the value of the goods allegedly stolen because he did not know exactly what items were taken. No other witness collaborated that the value of the goods exceeded the $5,000.00 amount. Similarly, no other documents submitted into evidence proved that the amount allegedly stolen exceeded $5,000.00.

b) By admitting government's Exhibit No. 1 into evidence, the District Court denied Robertson his 6th Amendment Right of Confrontation.

The 6th Amendment of the United States Constitution provides in pertinent part: "In all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him."

Of course, not all records may be admissible in all cases in a criminal trial; it is the duty of the Court to determine in each instance whether the particular record is constitutionally admissible under the 6th Amendment Guarantee of Confrontation of a Witness. United States v. Oates 560, F.2d 45, 81 (CA 2 1977); United States v. Lipscomb, 435 F.2d 795, 802 (CA 5 1970); McDaniel v. United States, 343 F.2d 785, 789 (CA 5 1965).

In the Lipscomb case, supra, the defendant argued that his 6th Amendment Right to confront witnesses against him was denied when a Bill of Lading was admitted without a foundation being established by the Bill's custodian. The Court of Appeals at page 802 acknowledged that such a constitutional right exists under the Business Rules Exception to the Hearsay Rule. The Court denied the defendant's claim because the District Court had carefully questioned the witness as to the making of the Bill of Lading and its use in the ordinary course of the company's business.

In the case before this Court, Robertson was not allowed to confront that person who prepared the list of the so-called stolen goods to determine if the list was prepared properly and on what basis decisions were made that certain items were, in fact, stolen. Only by such interrogation would it be possible to discover the procedure which was utilized in the taking of the inventory and whether the procedures were part of the ordinary course of the maker's business.

CONCLUSION

The Courts below erred in admitting into evidence Government's Exhibit Number 1, the only evidence that the value of the goods stolen exceeded $5,000, because an improper foundation was laid under the Business Records Exception to the Hearsay Rule and because the Appellant was denied his Sixth Amendment Right of Confrontation. Sentencing the Appellant

for stealing goods valued at over $5,000 based solely upon evidence which should never have been admitted for the reasons stated above unduly prejudiced that Appellant. It is therefore respectfully requested that the Court issue a writ of certiorari to review the decision below.

Respectfully submitted,

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CASES CITED — PAGE

Ace Freight Forwarding Co. v. Baltimore and Ohio R.R. Co. 202 A.2d 649 (D.C. 1964) — 6, 7

Gray v. L. J. Navy Trucking Co., Inc. 475 F.2d 545 (C.A. 6 1973 — 6

J. Howard Smith v. S. S. Maranon 501 F.2d 1275 (C.A. 1 1974) — 6, 10

McDaniel v. United States 343 F.2d 785 (C.A. 5 1965) — 10

Palmer v. Hoffman 318 U.S. 800, 63 S.Ct. 757 (1943) — 5, 6

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Standard Oil Company of California v. Moore 251 F.2d 188 (C.A. 9 1957) — 5, 10

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United States v. Lipscomb 435 F.2d 795 (C.A. 5 1970) — 10, 11

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Appendix A

United States Court of Appeals

FOR THE EIGHTH CIRCUIT

No. 78-1432

United States of America,

Appellee,

v.

Donald E. Robertson,

Appellant.

No. 78-1462

United States of America,

Appellee,

v.

Ronnie Little,

Appellant.

Appeals from the United States District Court for the Eastern District of Missouri

Submitted: October 16, 1978

Filed: November 20, 1978

Before BRIGHT, STEPHENSON and HENLEY, Circuit Judges.

STEPHENSON, Circuit Judge.

Defendants Ronnie Little and Donald E. Robertson appeal from convictions under a two-count indictment. Defendants were convicted on Count I of violating 18 U.S.C. § 2314 by transporting in interstate commerce various stolen goods with

a value of more than $5,000, knowing the goods to have been stolen, and on Count II of conspiring to transport the same goods in violation of 18 U.S.C. § 371.[1]

The evidence produced at trial disclosed that the defendants, along with coconspirators Charles and Ralph Axelson and Boyd Hicks, broke into a John Deere farm equipment sales and service store, William Nobbe & Company, located in Waterloo, Illinois, late in the evening of June 25, 1975, or early in the morning of June 26, 1975. Various merchandise including lawmowers, bicycles and mechanics' tools were stolen and transported to St. Louis, Missouri, where they were unloaded and stored at the home of Little. The primary damaging testimony was elicited from coconspirators Charles and Ralph Axelson. In return for their testimony they received immunity from prosecution on these charges and the United States Attorney wrote a letter to the parole board in El Reno, Oklahoma, where they were incarcerated on other convictions, explaining that they had cooperated in the prosecution of the defendants in this case.

On this appeal both defendants argue five identical issues and Little raises two additional claims of error.[2]

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[1] Defendant Robertson received a sentence of five years on Count I and a concurrent two-year sentence on Count II. Defendant Little received a sentence of seven years on Count I and a concurrent two-year sentence on Count II. The Honorable H. Kenneth Wangelin, United States District Judge for the Eastern District of Missouri, presided at the jury trial.

[2] Little listed three other arguments in his brief under "Issues Presented for Review," but did not argue them, either in the brief or during oral argument. We consider these issues to have been waived. In any event, the additional charges of court error in overruling the motion for bill of particulars, motion for production of witnesses prior to trial, and motion for records of grand jury vote are not demonstrated to be worthy of further consideration.

Initially both defendants contend that the district court should have granted their motions to dismiss because of pre-indictment delay. The crimes occurred approximately 34 months before the indictment. The uncontroverted statement of the government is that the first information about the crime implicating the defendants was received on September 23, 1976, approximately 15 months after the crime. On November 6, 1976, the government was able to confirm some of the information. Active investigation of the case continued until March 1, 1977. At that time the government concluded it was necessary to secure the cooperation of the Axelsons in order to convict the defendants. This cooperation was finally achieved on March 22, 1978. Sixteen days later the defendants were indicted.

Neither the time during which the government was completely unaware of the defendants' involvement in the crime, nor the period of active investigation by the government, should be considered in support of a pre-indictment delay claim. See United States v. Lovasco, 431 U.S. 783 (1977). Thus, only 16 days of the elapsed time are unaccounted for. This is not an impermissible delay. Moreover, no specific incident of prejudice resulting from the delay is even alleged by the defendants. Compare United States v. Naftalin, 534 F.2d 770 (8th Cir.), cert. denied, 429 U.S. 827 (1976), with United States v. Barket, 530 F.2d 189 (8th Cir.), cert. denied, 429 U.S. 917 (1976). See generally Preindictment Delay in the Eighth Circuit, 26 Drake L. Rev. 110 (1978).

The next issue raised by the defendants is that the district court erred in not granting their motions for severance of the offenses and for separate trials for the defendants. The defendants filed pretrial motions requesting severance and they were denied. The motions were not renewed at the

end of the government's evidence nor at the conclusion of all of the evidence. Therefore, the defendants have waived the right to assert the severance issue. United States v. Pelton, 578 F.2d 701, 711 (8th Cir. 1978). Moreover, examination of the record fails to disclose any prejudice to the defendants as a result of the joinder of offenses and defendants.

Another claim of error asserted by both defendants is the admission into evidence of government's Exhibit 1. Exhibit 1 is a list of the merchandise shipped to William Nobbe & Company from John Deere Company. Also included in the Exhibit is a column specifying the cost of each item to William Nobbe & Company. Another column labeled "Out of Stock" was usually filled out when an item was sold. In Exhibit 1 this column contains the notation "stolen" in connection with several items. These notations were apparently made by the insurance adjustor to indicate merchandise which had been received by William Nobbe & Company and which could not be accounted for after the burglary. It was error to admit Exhibit 1 into evidence in its entirety because the notation "stolen" was not entered on Exhibit 1 in the ordinary course of William Nobbe & Company's business. See Hiram Ricker & Sons v. Students Int'l Meditation Soc'y, 501 F.2d 550, 554 (1st Cir. 1974); Picker X-Ray Corp. v. Frerker, 405 F.2d 916, 922-24 (8th Cir. 1969); Williams v. United States, 323 F.2d 90, 95 (10th Cir. 1963); Hartzog v. United States, 217 F.2d 706, 709-10 (4th Cir. 1954); Fed. R. Evid. 803(6). Compare Cullen v. United States, 408 F.2d 1178, 1179-80 (8th Cir. 1969). However, the Exhibit was admissible in all other respects as a record kept in the regular course of business. It was admissible to show the items which John Deere Company had shipped to William Nobbe & Company. It also provided evidence of which items were on hand as of June 25, 1975, and their value.

The defendants contend that their convictions should be reversed because Exhibit 1 provided the only evidence that the value of the goods exceeded $5,000, as is required by the statute. We conclude, however, that the error was not prejudicial to the defendants. Robert Nobbe, a part-owner of William Nobbe & Company, was allowed without objection to use Exhibit 1 as an aid in his testimony concerning what merchandise was stolen and its value. In response to the prosecuting attorney's question, "Have you been able to establish a total value for the items taken?" Nobbe responded, "Somewhere over $14,000." In addition, defendants' counsel used Exhibit 1 in their cross-examination of Nobbe. The only objection to Exhibit 1 came when the government introduced Exhibit 1 into evidence at the end of its case. At that time admission of the Exhibit was only cumulative and non-prejudicial. Nobbe had earlier testified that $4,000 worth of mechanics' tools not included in the Exhibit had been stolen, and in their testimony coconspirators Charles and Ralph Axelson had described the stolen property. The description of the stolen property corresponded with items listed in Exhibit 1 with a total value well in excess of $5,000. Charles Axelson stated that they took four riding lawnmowers, a number of power tools, tool chests, garden hoses, lawn trimming equipment, push lawnmowers and bicycles. Ralph Axelson similarly testified that they stole garden tractors, lawnmowers, bicycles, garden hoses, tools, and a variety of other things. Under all the circumstances we are satisfied that there was sufficient evidence from which the jury could properly find that the total value of the stolen goods exceeded $5,000.

At trial the defendants objected to all of the court's instructions on conspiracy. On this appeal the defendants only contest the instruction which defined conspiracy as "a combination or agreement of two or more persons to accomplish

some unlawful purpose, or to accomplish some lawful purpose by unlawful means." Defendants argue that instead of "of," the district court, in its instruction, should have used the word "among" to convey to the jury that there must be an actual meeting of the minds of the participants in a conspiracy. This argument ignores the fact that when the conspiracy instructions are considered as a whole it is clear that the jury was informed that to find a conspiracy they must find that the defendants had a mutual understanding to try to accomplish a common and unlawful plan. The court's instructions properly defined conspiracy. See 2 E. Devitt and C. Blackmar, Federal Jury Practice and Instructions § 27.04 (3d ed. 1977).

The final issue raised by both defendants is that the district court erred in denying their motions for acquittal at the end of the government's case and at the close of all the evidence. The basis for this argument is that the convictions rest upon the erroneous admission of Exhibit 1 and the obviously untruthful testimony of Charles and Ralph Axelson. The defendants' claim with respect to Exhibit 1 has been discussed, supra, and will not be restated here. In support of their claim that the testimony by the Axelsons was insufficient to support a conviction, the defendants point out various inconsistencies in their testimony concerning details of the burglary. The defendants fail to mention the far greater similiarities in the Axelsons' testimony concerning the major aspects of the burglary which occurred almost three years prior to trial and the fact that some of their testimony was corroborated by other witnesses. The inconsistencies in the Axelsons' testimony and their motives to testify falsely were vigorously argued to the jury by defendants' counsel. The jury resolved the matter of credibility of the witnesses against the defendants and the jury's determination will not be overturned by this court on appeal. See, e.g., Hodgdon v.

United States, 365 F.2d 679, 685-86 (8th Cir.), cert. denied, 385 U.S. 1029 (1966).

Two additional issues are raised by defendant Little on this appeal. First, he claims that the court's instruction on reasonable doubt was in error. This contention is without merit. The identical instruction was approved by this court in United States v. Knight, 547 F.2d 75, 77 (8th Cir. 1976). Second, he argues that the court should have dismissed the indictment because it was deficient in several respects. We have considered each of Little's claims and are satisfied that the district court properly denied his motion to dismiss the indictment.

After a careful examination of the record we are convinced that the defendants received a fair trial and the convictions should be affirmed.

Affirmed.

A true copy.

Attest:

CLERK, U. S. COURT OF APPEALS, EIGHTH CIRCUIT.